

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

OHIO COLLEGE PREPARATORY SCHOOL
Employer

and

Case 08-RC-199371

CLEVELAND ALLIANCE OF CHARTER
TEACHERS AND STAFF LOCAL 6570 A/W
OHIO FEDERATION OF TEACHERS, AFL-CIO
Petitioner

DECISION AND ORDER REMANDING

Pursuant to a Stipulated Election Agreement, a *Sonotone* election¹ was held on June 5, 2017. The tally of ballots showed that, by a vote of 2 for and 15 against, the professional employees voted against inclusion in a unit with nonprofessional employees. The tally of ballots also showed that the professional employees voted in favor of representation by the Petitioner by a vote of 9 for and 8 against, with no challenged ballots.² The Employer filed an objection, on which the Regional Director directed a hearing. Following the hearing, the Hearing Officer recommended overruling the objection, and the Employer filed exceptions. On March 6, 2018, the Regional Director affirmed the Hearing Officer's recommendation and issued a Certification of

¹ Section 9(b)(1) of the Act states that the Board shall not decide that any unit is appropriate for the purposes of collective bargaining "if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit." The Board utilizes *Sonotone* elections, in which professional employees vote both with respect to whether they want to be represented by the petitioner and whether they want to be in a unit with nonprofessionals, to comply with this statutory mandate. See *Sonotone Corp.*, 90 NLRB 1236 (1950).

² The nonprofessional employees voted against representation, which result is not in dispute.

Representative for the unit of professional employees. Thereafter, in accordance with Section 102.67 of the National Labor Relations Board's Rules and Regulations, as amended, the Employer filed a request for review. The Petitioner filed an opposition.

The dispute in this case involves whether two professional employees were improperly disenfranchised because—due to an inaccurate *Excelsior* voter list—they were given, and voted with, nonprofessional ballots. As a result, their votes were not counted as part of the professional employee voting group. The Employer argues that these employees were disenfranchised through no fault of their own, and that because their votes could have proved dispositive with respect to whether the professionals wished to be represented by the Petitioner, the election must be set aside.

For the reasons stated below, the Employer's Request for Review of the Regional Director's Decision and Certification of Representative is granted as it raises substantial issues warranting review. Upon review, we find that the two voters at issue were improperly disenfranchised from casting ballots in the professional voting group. Because their two votes could have proved determinative of whether the professional group desired representation, by the Petitioner, as the Petitioner prevailed by one vote in that election, we find that that election must be vacated and a second election directed with respect to whether the professional employees wish to be represented by the Petitioner.³

Pursuant to *Sonotone* procedures, the parties' Stipulated Election Agreement provided for two voting groups, one for professional employees and one for

³ The professional employees voted against inclusion in the same unit as nonprofessionals. Our decision today does not disturb the results of that vote, because the two disputed ballots could not have altered that result.

nonprofessional employees. The Agreement further provided that assistant teachers were included in the professional voting group, whereas teaching assistants were included in the nonprofessional voting group. The Notice of Election similarly set forth the voting group descriptions, including the respective placement of the assistant teachers and teaching assistants. The Notice also included a sample of both the nonprofessional ballot (with its single question whether the employees want to be represented by the Petitioner) and the professional ballot (with two questions: whether the employees want representation by the Petitioner and whether they want to be included in a unit with the nonprofessionals).

Employees Deondra Franklin and Sharice Wright are both assistant teachers. When preparing the *Excelsior* voter list, however, the Employer misclassified Franklin and Wright as teacher assistants, a nonprofessional classification. There is no dispute that this misclassification was an inadvertent error.

On the day of the election, when Wright arrived at the polls, the Petitioner's observer consulted the voter list and identified Wright as a nonprofessional employee. The Board agent handed Wright a nonprofessional ballot, and she voted using the nonprofessional ballot. Wright did not, at this point, raise any question about her classification as a nonprofessional. After leaving the polling place, she discussed the election with another professional employee, who indicated that her ballot had contained two questions. Wright became concerned that she had received the wrong ballot and, as the polls were still open, returned to the polling place to make an inquiry. She asked the Board agent and the parties' observers how she was classified on the

voter list, and the Petitioner's observer responded that she was listed as a (nonprofessional) teacher assistant.

Like Wright, Franklin arrived at the polls, was identified as a nonprofessional due to the incorrect voter list, voted using a nonprofessional ballot, and did not raise any concerns while voting. At some point after the election, a co-worker asked her how many questions had appeared on her ballot. When Franklin responded that her ballot had contained one question, the co-worker advised Franklin to contact Wright, who had also voted using the wrong ballot.

It is well established that an employer is generally "foreclosed from filing an objection based solely on its failure, even if inadvertent, to comply fully with its obligation under the *Excelsior* rule to include all eligible voters on the *Excelsior* list." *Thiele Industries, Inc.*, 325 NLRB 1122, 1122 (1998). But an exception exists. As the Board stated in *Republic Electronics, Inc.*, 266 NLRB 852, 853 (1983):

while a party to an election is ordinarily estopped from profiting from its own misconduct, the Board has recognized a limited exception to this rule. Thus, where a party to the election causes an employee to miss the opportunity to vote, the Board will uphold the wrongdoer's objection if the vote is determinative, there is no evidence of bad faith, and the employee was disenfranchised through no fault of his or her own [Footnote omitted.]

Here, the Regional Director found, and no party disputes, that Franklin and Wright's votes were determinative in the representation election for the professional voting group, and that there is no evidence of bad faith. Nevertheless, the Regional Director found that Franklin and Wright were not disenfranchised because they were able to cast a ballot and because, even if they cast the incorrect ballot, they were at fault for doing so. The Regional Director observed that the Notice of Election included their

classifications in the description of the professional voting group and showed a copy of the professional employees' ballot, which had two questions, and therefore, Franklin and Wright were apprised of their rights and how to exercise them. The Regional Director found that Franklin and Wright therefore "disenfranchised themselves" when, despite being identified as nonprofessional employees and receiving a ballot with only one question, they did not raise their concerns with the Board agent at that time and insist on voting under challenge or otherwise "challenge" the Board agent.

We agree that the key question here under the *Republic Electronics* framework is whether Franklin and Wright were at fault for their disenfranchisement.⁴ Contrary to the Regional Director, however, we find that, under the circumstances of this case, they were not at fault for voting with the incorrect ballots. At most, the Board requires employees to show up to the polls and attempt to vote. See *Berryfast, Inc.*, 265 NLRB 82 (1982) (employee was not disenfranchised when she did not go to the polls during maternity leave but sent her husband to determine her eligibility), *enfd.* 741 F.2d 1161 (9th Cir. 1984); *NLRB v. Triangle Express, Inc.*, 683 F.2d 337 (10th Cir.1982) (no disenfranchisement where names of employees were omitted from the *Excelsior* list, but there was no evidence that employees were aware of the omission or would have been precluded from voting under challenge if they had attempted to vote, and they did not go to the polls and were not prevented or discouraged from doing so). Here, Franklin and Wright did show up at the polls, presented themselves to vote, and cast ballots.

⁴ The Regional Director suggested that Franklin and Wright were not "technically" disenfranchised because they actually voted. We disagree. The use of the wrong ballots effectively disenfranchised them; they were precluded from making one of the two electoral choices they were entitled to make as members of the professional employee voting group.

Especially in light of the fact that they were voting in a *Sonotone* election at a workplace with no previous history of union elections, it was not incumbent upon Franklin and Wright to take additional action. They both reasonably relied on the implicit assumption that the Board agent provided them with the proper ballots. Compare *Republic Electronics*, supra, 266 NLRB at 853 (second election directed where “in light of [assurances from his supervisor that employee Wells would be called to vote], it was not incumbent upon [the employee] to demand to speak to the Board agent; rather we find that it was natural for Wells to trust his supervisor's declarations, and to rely on him to follow through on those declarations.”). The employees’ reliance on the apparent imprimatur of the Board agent when they timely presented themselves to vote provides a compelling case for disenfranchisement here.

Accordingly, we vacate the results of the election, and remand this case to the Regional Director to conduct a second election to determine solely whether the professional employees wish to be represented by the Petitioner.

MARVIN E. KAPLAN, MEMBER

WILLIAM J. EMANUEL, MEMBER

Dated, Washington, D.C., July 30, 2018.

MEMBER PEARCE, dissenting:

Contrary to my colleagues, I would deny the Employer’s request for review of the Regional Director’s decision to dismiss its objection alleging that two professional employees were improperly disenfranchised in the election. In my view, the Employer has not met its burden under Section 102.67(d) of the Board’s Rules and Regulations of showing that the Regional Director's determination departs from Board precedent or

was clearly erroneous on a factual issue. On the contrary, the Regional Director carefully analyzed the undisputed facts, applied existing precedent, and reasonably determined that the objection lacked merit.

Pursuant to a stipulated election agreement, a *Sonotone*¹ election was held to determine whether units of professional and non-professional employees wished to be represented by the Petitioner. The Petitioner won the election in the professional unit,² but did not receive a majority of the votes in the non-professional unit. There were no challenged ballots.

Thereafter, the Employer filed an objection alleging that professional employees Sharice Wright and Deandra Franklin were improperly disenfranchised because the Employer incorrectly identified them as non-professional employees on the voter eligibility list. As a result, they received and cast non-professional ballots, rather than professional ballots where their votes were potentially determinative.

The Regional Director overruled the Employer's objection, concluding that Wright and Franklin were disenfranchised "through their own inaction." The Regional Director observed that Board decisions place a high level of responsibility on employees to read the notice of election, to follow the instructions in the notice, and to ask questions of the Board agents in charge of the election if any doubts arise as to their eligibility.³ Applying that standard, the Regional Director found that the Board's official notice of

¹ *Sonotone Corp.*, 90 NLRB 1236 (1950).

² The professional employees voted against inclusion with the non-professional employees, but voted 9 to 8 in favor of representation in a separate professional unit.

³ See *NLRB v. Triangle Express, Inc.*, 683 F.2d 337, 338-339 (1982); *Berryfast, Inc.*, 265 NLRB 82, 83 (1982); and *George Washington University*, 346 NLRB 155, 156 fn. 6 (2005).

election was posted at the Employer's facility in conspicuous places at least three full working days prior to the election. The notice expressly included Wright's and Franklin's classification in the description of the professional voting group and showed a copy of the professional employees' ballot, which had two questions. The Regional Director found that Wright and Franklin therefore "disenfranchised themselves" when, despite being identified at the polls as non-professional employees and provided ballots with only one question, they did not voice any concerns with the Board agent or attempt to vote in the professional unit under challenge. I agree.

The notice of election defined the two voting groups as Unit A (professional unit) and Unit B (non-professional unit) and clearly listed the job classifications included and excluded in each unit. Specifically, the notice stated that those employees included in Unit A were: "All full-time and regular part-time professional instructional and student service support employees including but not limited to teachers, intervention specialists, and assistant teachers...." With respect to Unit B, the notice stated that the unit included: "All full-time and regular part-time non-professional instructional and student service support employees, including but not limited to co- teachers, teacher assistants, one-on-one assistants, and aids...." The non-professional job classifications were expressly excluded from Unit A and the professional job classifications were expressly excluded from Unit B. The notice of election also included a sample ballot for each unit. The sample ballot for the professional unit contained two questions: (1) whether the voter wished to be included in a unit with non-professional employees and (2) whether the voter wished to be represented by the Petitioner, while the sample ballot for the non-professional unit contained only one question—whether the employees wished to be

represented by the Petitioner. The notice instructed employees to contact the National Labor Relations Board if they had any questions regarding the election and provided the telephone number for the Regional Office.

Wright and Franklin are assistant teachers, a classification in the stipulated unit of professional employees. However, when the Employer prepared the voter eligibility list, it inadvertently classified them as teacher assistants, a classification in the non-professional unit. When Wright went to the polls to vote, the Petitioner's observer, reading from the voter eligibility list prepared by the Employer, announced that Wright was a non-professional employee. Wright did not challenge that statement, and received and cast a non-professional ballot, which had only one question. After leaving the polls, Wright discussed the election with another professional employee, who indicated that her ballot had contained two questions. Wright then returned to the open polls and asked how she was classified on the voter list. The Petitioner's observer told Wright that she was classified as a teacher assistant. Although Wright knew that her correct job classification was assistant teacher, she merely responded "Okay," and left. Wright spent the remainder of the polling period "laughing and talking" with other employees about the confusion caused by the two ballots, while "waiting on the count . . . so we can see if they won, the union, or not." It was only after learning that the Union had won the election in the professional unit that Wright informed the Employer and the Board agent that she had received the wrong ballot.

Like Wright, Franklin arrived at the polls, was identified as a non-professional employee, and was handed a non-professional ballot. Although Franklin admittedly heard the misidentification, she did not inform the Board agent that she had received

the wrong ballot or attempt to vote in the professional unit under challenge.

In reversing the Regional Director, the majority finds, in essence, that he unfairly placed the onus on Wright and Franklin to understand the procedures in a *Sonotone* election and to protest when they were given the wrong ballot. However, the majority's finding that the two employees "reasonably relied on the implicit assumption that the Board agent provided them with the proper ballots" is curiously incongruent with the facts of this case. The Board agent could not have known that Wright and Franklin were assistant teachers, and not teacher assistants, as they were identified on the voter list. Conversely, Wright and Franklin *did* know their correct title. Further, they had full access to the notice of election that unambiguously stated that assistant teachers are part of the professional unit, and that included sample ballots for both the professional and non-professional unit. Contrary to the majority, I do not agree that the Regional Director erred in imposing an obligation on Wright and Franklin to read the notice of election and to ask questions and/or attempt to vote under challenge when they were informed at the polls that they would vote as nonprofessionals. Nor do I accept the majority's implication that, even had Wright and Franklin read the notice of election, they could not have understood it. Possessed of college degrees, and tasked with teaching students reading and comprehension, among other subjects, Wright and Franklin could have had little difficulty in understanding the clear text of the notice.

In sum, the Regional Director's findings are supported by the record, certainly are not clearly erroneous, and are consistent with Board precedent.⁴ Accordingly, I would deny the Employer's request for review.

MARK GASTON PEARCE, MEMBER

⁴ See *NLRB v. Triangle Express, Inc.*, supra, 683 F.2d at 338-339; *Berryfast*, supra, 265 NLRB at 83; and *George Washington University*, supra, 346 NLRB at 156 fn. 6.